Supreme Court, U.S.
FILED
JUL 1 - 2010
OFFICE OF THE CLERK

No. 10-44

In The

Supreme Court of the United States

JOHN RAY SAIN,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals At Austin, Texas

PETITION FOR WRIT OF CERTIORARI

DANNY D. BURNS
Attorney for Petitioner
115 North Henderson Street
Fort Worth, Texas 76102-1940
(817) 870-1544 telephone
(817) 870-1589 facsimile
dburnslaw@sbcglobal.net

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

DOES AN OUT OF COURT STATEMENT, MADE TO A POLICE OFFICER OR OTHER INDIVIDUAL WHICH COULD BE USED TO SUPPORT A CLAIM OF ABUSE IN A DIVORCE PROCEEDING OR A CRIMINAL PROCEEDING INVOLVING FAMILY VIOLENCE AMOUNT TO A TESTIMONIAL STATEMENT REQUIRING CONFRONTATION IN ORDER TO BE ADMISSIBLE IN A CRIMINAL PROCEEDING?

LIST OF PARTIES

Petitioner:

John Ray Sain

Respondent:

The State of Texas

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. Course of Proceeding and Disposition Below	4
B. Statement of Facts Relevant to Petition	5
REASONS FOR GRANTING THE WRIT	7
DOES AN OUT OF COURT STATEMENT, MADE TO A POLICE OFFICER OR OTHER INDIVIDUAL WHICH COULD BE USED TO SUPPORT A CLAIM OF ABUSE IN A DIVORCE PROCEEDING OR A CRIMINAL PROCEEDING INVOLVING FAMILY VIOLENCE AMOUNT TO A TESTIMONIAL STATEMENT REQUIRING CONFRONTATION IN ORDER TO BE ADMISSIBLE IN A CRIMINAL PROCEEDING?	8
CONCLUSION AND PRAYER	11

TABLE OF CONTENTS – Continued

Page

APPENDIX

Postcard denial of PDR ..... App. 1

Denial of State Court writ of habeas corpus ..... App. 2

Opinion from Second Court of Appeals ..... App. 11

Order designating issues ..... App. 33

Judgment of conviction and sentence ..... App. 36

Indictment ..... App. 41

TABLE OF AUTHORITIES

Page

CASES:

Chambers v. Mississippi, 410 U.S. 284 (1973) 10

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....7, 9

Douglas v. Alabama, 380 U.S. 415 (1965) 10

Giles v. California, 544 U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008).....6, 10

Hammon v. Indiana, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).....7, 8

Melendez-Dias v. Massachusetts, 557 U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).....7

Shelby v. State, 819 S.W.2d 544 (Tx.Cr.App. 1991).....10

CONSTITUTIONAL PROVISIONS:

Fifth Amendment 2

Sixth Amendment.....3, 10

Fourteenth Amendment 3, 10

28 U.S.C. §1257 2

28 U.S.C. §2104 2

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the final decision of the Texas Court of Criminal Appeals in this case. The State Court petition for writ of habeas corpus was denied by a postcard notification on April 7, 2010.

OPINIONS BELOW

The Texas Second Court of Appeals issued its unpublished opinion in this case on December 20, 2007. In that opinion the Court found admissible the hearsay statements of the deceased, Elena Sain, to Valerie Shepard. In those hearsay statements Elena Sain claimed Petitioner John Ray Sain physically and emotionally abused her and that she, Elena Sain, feared that Petitioner Sain was going to kill her. The Second Court of Appeals held these statements were "volunteered" to Ms. Shepard and "Spontaneous statements to acquaintances are not testimonial." (Opinion, p. 11). The Court also found that the testimony of Vernette Langon, a Texas Department of Public Safety highway patrol trooper and neighbor were not testimonial because they were not the result of interrogation. The Court further found that "Generally, statements that are made to police while the declarant believes that she is in personal danger are not made with consideration of their legal ramifications because the declarant speaks out of urgency and a desire to obtain a prompt response." (Opinion, pp. 12-13).

Petitioner filed a timely Petition for Discretionary Review with the Texas Court of Criminal Appeals which was denied on June 11, 2008. A rehearing was rejected on June 30, 2008 and was received on June 30, 2008. A final disposition was made on June 11, 2008. A writ of habeas corpus was filed in the trial court on August 14, 2009. The Texas Court of Criminal Appeals denied the writ on April 7, 2010 without a hearing on the trial court findings, also made without a hearing.

This Application for Writ of Certiorari is, therefore, due on or before July 6, 2010.

JURISDICTION

This Honorable Court has jurisdiction to review a final decision of the highest State court of appeals in which a decision could be had pursuant to 28 U.S.C. §1257 and 28 U.S.C. §2104.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America, which reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

> service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States of America, which reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States of America, which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceeding and Disposition Below.

The Petitioner Mr. John Ray Sain was indicted for the offense of murder a first degree felony. The offense was alleged to have occurred on or about November 15, 2003. (TR., p. 3).

The Defendant entered a plea of not guilty. The jury trial was held in the Criminal District Court No. 1 of Tarrant County, Texas. (TR., p. 4). The Petitioner Mr. John Ray Sain was found guilty as charged and the Jury assessed punishment at fifty (50) years in the Texas Department of Criminal Justice, Institutional Division.

Petitioner John Ray Sain filed a timely notice of appeal and the Second Court of Appeals affirmed the conviction and sentence on December 20, 2007. A Petition for Discretionary Review was filed with the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals denied review on June 11, 2008. A rehearing petition was rejected on June 30, 2008 and filed the same day. A final disposition was made on July 7, 2010.

A writ of habeas corpus was denied by the Texas Court of Criminal Appeals on April 7, 2010.

B. Statement of Facts Relevant to Petition.

Valerie Shepard testified that the deceased, Elena Sain, told her and the security officer that she was leaving an abusive situation and that she was afraid that Petitioner Sain was going to kill her. (R., Vol. 3, pp. 36-37 and before the jury p. 95, objection at pp. 38-39). The confrontation objection was specifically addressed by the State and the trial court. (R., Vol. 3, p. 39). The trial court overruled the defense objections. (R., Vol. 3, pp. 39-41, overruled p. 41 and p. 95).

After a hearing was held outside the presence of the jury the trial judge, over Petitioner Sain's objections, allowed the State to go into the exchanges between Elena Sain and Ms. Shepard in reference to Elena Sain leaving an abusive situation, the safety of not only Elena Sain but the dogs as well, and that she, Elena Sain, believed Petitioner Sain was going to kill her. (R., Vol. 3, pp. 38-41, objection overruled p. 41 and p. 95). The defense was granted a continuing objection to these matters. (R., Vol. 3, p. 42). The trial court allowed the State, over Petitioner Sain's timely objections, to go into the deceased's statements regarding Elena Sain's leaving an abusive situation, the safety and abuse of not only Elena but of her dogs, and that Elena Sain believed Petitioner Sain was going to kill her. (R., Vol. 3, p. 43 and p. 95).

The State also introduced the testimony of Vernette Langon, an off-duty State Trooper with the

Texas Department of Public Safety, whom Elena Sain contacted for assistance as a police officer in going with Elena Sain to Elena Sain's house to get some "of her stuff out." (R., Vol. 3, pp. 45, 46-48, 176-177). The defense objections to confrontation were again overruled. (R., Vol. 3, p. 50, p. 176). Trooper Langon testified Elena Sain requested Trooper Langon's help because Elena Sain had been abused by her husband, Petitioner Sain. (R., Vol. 3, p. 176). The continuing objection was reaffirmed by the trial court. (R., Vol. 3, p. 176). Trooper Langon further testified that although she, Elena Sain, knew her husband was not at the home, Elena Sain was still scared to go into the house to get some of her stuff out. (R., Vol. 3, p. 176).

The State asserted as one of its grounds for admissibility at trial forfeiture by wrong doing. (R., Vol. 3, p. 49). The Supreme Court of the United States has specifically rejected that theory in *Giles v. California*, 544 U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). Neither the trial court nor the Texas Court of Criminal Appeals relied upon the forfeiture by wrong doing theory as a basis to affirm the conviction, holding rather that the conversations admitted were not covered by the Confrontation Clause.

After arguments of counsel, the jury returned a guilty verdict. A further punishment hearing was held and the jury returned a sentence of fifty (50) years in the institutional division of the Texas Department of Criminal Justice.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting the writ. This Honorable Court has consistently noted that an absence of interrogation does not imply that statements made in the absence of any interrogation are necessarily nontestimonial. *See*: *Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266 at 2274, 165 L.Ed.2d 224 (2006) The Court left for another day any effort to spell out a comprehensive definition of testimonial. *Crawford v. Washington*, 541 U.S. 36 at 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) This Court has already decided that an analyst's laboratory report is not admissible in light of a *Crawford* objection. *Melendez-Dias v. Massachusetts*, 557 U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). The Court has not, however, given a comprehensive definition of testimonial as of yet. Can an out of court statement, made to a police officer or otherwise which could be used to support a claim of abuse in a divorce proceeding or in a criminal proceeding involving family violence amount to a testimonial statement and require confrontation in order to be admissible? This question remains unanswered and should be addressed by this Honorable Court.

DOES AN OUT OF COURT STATEMENT, MADE TO A POLICE OFFICER OR OTHER INDIVIDUAL WHICH COULD BE USED TO SUPPORT A CLAIM OF ABUSE IN A DIVORCE PROCEEDING OR A CRIMINAL PROCEEDING INVOLVING FAMILY VIOLENCE AMOUNT TO A TESTIMONIAL STATEMENT REQUIRING CONFRONTATION IN ORDER TO BE ADMISSIBLE IN A CRIMINAL PROCEEDING?

This case squarely presents the question of whether an out of court statement not made during questioning for a criminal proceeding but which statements are obviously statements which could be used in a court proceeding involving a divorce action or even a criminal action for family violence must be subject to cross examination before the statements are admissible in a subsequent criminal trial. A person involved in a relationship may well create evidence before the filing of a divorce petition or a charge of family violence. Making these statements admissible because they were not a product of interrogation could render the Confrontation Clause rights meaningless. In Petitioner Sain's case the only evidence of abuse in his marriage came from these witnesses who were repeating the statements of the deceased. Petitioner Sain's case is somewhat similar to the statements held inadmissible in *Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The testimony in this case involved statements made when Ms. Sain was not in an emergency situation. There was no indicia of truth or falsity in

the situation surrounding the making of the statements. The person making the statements, at the time of the statements, had an incentive to either exaggerate or lie. The testing of those statements through cross examination was critical to truth seeking function of the jury. The Confrontation Clause applies only to witnesses against the accused, in other words to those who bear witness against the defendant in a criminal proceeding. *See*: *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). A person making statements alleging criminal conduct against an individual who later becomes a criminal defendant even before trial bears witness against that accused. The person making the adverse claims is witnessing against the accused. In Petitioner Sain's case the out of court statements of the wife were devastating in the trial. Absent the hearsay statements from the deceased wife, Elena Sain, testified to by Valerie Shepard and Vernette Langon regarding the alleged past abuse by Petitioner Sain on Elena Sain and her dogs, there was no evidence of motive or intent on the part of Petitioner Sain to kill his wife. The jury would have had a different outlook on Petitioner Sain and his testimony and an acquittal was likely. The evidence of him having shot through the window while kneeling beside the bed support Petitioner Sain's assertions that he believed he was shooting an intruder. The bullet creased the covers on the bed.

Mr. Sain never had the opportunity to cross examine the statements and was convicted on the

testimony of a witness who was never confronted in violation of the Sixth Amendment of the United States Constitution. The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that in a criminal trial, the accused shall have the right to be confronted by the witnesses against him. U.S. Const. amend. VI. The right to cross examination is the primary interest secured by the Confrontation Clause. *Douglas v. Alabama*, 380 U.S. 415 (1965); *Shelby v. State*, 819 S.W.2d 544 (Tex.Cr.App. 1991). This Court has held that the diminution of this right calls into question the ultimate integrity of the fact-finding process. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). These rights are applicable to state proceedings through the Fourteenth Amendment of the U.S. Constitution. This Court decided that the forfeiture by wrong doing does not allow the admission of statements unless the defendant acted to prevent the testimony on June 25, 2008 in *Giles v. California*. *Giles v. California*, 544 U.S. ___. 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). There was no forfeiture by wrong doing in Mr. Sain's case.

This Honorable Court should grant certiorari in order to decide whether the statements involved in this case were testimonial in nature and therefore subject to cross examination in order to be admissible. This is an important case and provides the opportunity to the Court to more specifically define when out of court statements are testimonial.

CONCLUSION AND PRAYER

The issues raised in this Application for Writ of Certiorari raise very substantial and important questions of Constitutional law which affect numerous criminal trials. This Honorable Court should grant Certiorari to the Texas Court of Criminal Appeals to resolve these questions. Accordingly, Petitioner John Ray Sain respectfully prays that the writ for certiorari to the Texas Court of Criminal Appeals sitting in Austin, Texas issue herein and for such other and further relief to which he may be justly entitled.

Respectfully submitted,

DANNY D. BURNS
Attorney for Petitioner
115 North Henderson Street
Fort Worth, Texas 76102-1940
(817) 870-1544 telephone
(817) 870-1589 facsimile
dburnslaw@sbcglobal.net

[SEAL] TEXAS COURT OF CRIMINAL APPEALS

Case # WR-73,680-01 -> Event: ACTION TAKEN

CaseMail

Event Information:

Event Type:	ACTION TAKEN
Description:	Application for Writ of Habeas Corpus – 11.07
Date:	4/7/2010
Disposition:	HC denied W/O written order on TC Fndgs-w/o Hear

Opinion Written:

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

RE: Writ No. WR-73,680-01
STYLE: Sain, John Ray
TRIAL CT NO: C-1-008852-09858314A
4/7/2010

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

Louise Pearson, Clerk

Danny D. Burns
115 N. Henderson Street
Ft. Worth, TX 76102-1940

C-1-008852-0985831-A

EX PARTE	§	**IN THE CRIMINAL DISTRICT**
	§	**COURT NUMBER ONE OF**
JOHN RAY SAIN	§	**TARRANT COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this 16 day of March, 2010 came on to be considered Applicant's Application for Writ of Habeas Corpus. Having considered this application, Applicant's Proposed Findings, the State's Response and Proposed Findings, and material in the original trial court jacket, this Court enters the following Findings of Fact and Conclusions of Law:

History of the Case

1. On May 30, 2006, Applicant was convicted by a jury of murder, a first degree felony. The jury sentenced Applicant to 50 years incarceration in the Institutional Division of the Texas Department of Criminal Justice. *See* Judgment. *See* Judgment.

2. The Second District Court of Appeals affirmed Applicant's conviction on December 20, 2007. *See Sain v. State*, No. 02-06-00184-CR, 2007 WL 4462599 (Tex. App. – Fort Worth December 20, 2007, pet. ref'd) (not designated for publication). Applicant's petition for discretionary review was denied on July 8, 2008.

3. Applicant is presently confined and restrained of his liberty in custody of the Texas Department of Criminal Justice.

4. On August 3, 2009, Applicant filed a post-conviction Application for Writ of Habeas Corpus under TEX. CODE CRIM. PROC. ANN. art 11.07. Applicant filed an amended Application on August 14, 2009. Applicant raises four grounds for relief. In grounds one through three, Applicant complains that he was denied his constitutional right of confrontation because the Trial Court erred in allowing highly prejudicial hearsay statements into evidence. Applicant alleges in his fourth and final ground that he was denied his rights of due process and a fair trial because the Trial Court erred in failing to adequately instruct the jury as to external influences.

Grounds One, Two and Three:
Right to Confrontation

1. Applicant admits that Grounds One, Two and Three were raised and rejected on direct appeal.

2. Applicant asserts that new case law from the Supreme Court of the United States requires review of his claims. Specifically, Applicant contends that subsequent to his direct appeal, the Supreme Court rejected the "forfeiture by wrongdoing" doctrine. *See Giles v. California*, 128 U.S. 2678 (2008). However, this Court notes that the Supreme Court in Giles rejected the "forfeiture by wrongdoing" doctrine only as to *testimonial* statements made outside the

courtroom when the person making those statements has not been cross-examined, even if that person is unavailable due to the defendant's wrongdoing. *Id.* at 2682.

a. The Supreme Court of the United States has held that the admission of a hearsay statement made by a nontestifying declarant violates the Sixth Amendment if the statement was testimonial and the defendant lacked a prior opportunity for cross-examination, even if the statement falls under a hearsay exception. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Testimonial applies, at a minimum, to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

b. The Texas Court of Criminal Appeals stated that the testimonial character of a statement is determined by a reasonable, similarly situated declarant's ability to appreciate the legal ramifications of his statement. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

3. In Ground One, Applicant claims that the Trial Court erred in allowing highly prejudicial hearsay statements of Karen LaBarre to be admitted, thus violating Applicant's right to confrontation. During trial, Applicant objected to LaBarre's testimony regarding statements made by the victim on November 12, 14 and 15. In a hearing outside of the jury, the Trial Court sustained the objections to the November 12 and

14 statements, and LaBarre did not testify to those statements. The Court summarized the November 15 statements concerning only the victim's return to the house to get her things and reasons why the victim thought Applicant was not home.

a. This Court notes that LaBarre did not testify before the jury that the victim told her that Applicant was going to kill her or that Applicant had abused her.

b. Applicant did not object to the testimony proffered by LaBarre. The Second Court of Appeals stated that this failure to object waived Applicant's right to complain. *Sain*, No. 02-06-00184-CR, 2007 WL 4462599 at *17. Additionally, failure to timely object waives the issue for review in a collateral attack. *See Ex parte Crispen*, 777 S.W.2d 103, 105 (Tex. Crim. App. 1989).

c. Because Applicant failed to object to LaBarre's testimony regarding the victim's statements concerning her return to the house and the reasons she though Applicant was not home, Applicant waived his right to complain. Applicant's first ground of relief should be denied.

4. In Ground Two, Applicant claims that the Trial Court erred in allowing the highly prejudicial hearsay testimony of Valerie Shepard to be admitted. Specifically, Applicant contends that the victim's statements to Shepard were testimonial hearsay and their admission violated Applicant's right to confrontation. Shepard, an

assistant property manager who showed the victim an apartment the day before her death, testified to statements made by the victim concerning three issues: security measures in the apartment, abuse of the victim, and the victim's fear that Applicant would kill her. Applicant objected to Shepard's testimony regarding the victim's statements about her abuse and fear that Applicant would kill her; the Trial Court overruled Applicant's objections.

a. Statements made to acquaintances are not testimonial. *Woods v. State*, 152 S.W.3d 105, 114 (Tex. Crim. App. 2004), *cert. denied*, 544 U.S. 1050 (2005); *Freeman v. State*, 230 S.W.3d 392, 401 (Tex. Crim. App. – Eastland 2007, pet ref 'd). The Second District Court of Appeals determined that the victim's statements to Shepard were not testimonial and admission of the statements did not violate the Confrontation Clause. *Sain*, No. 02-06-00184-CR, 2007 WL 4462599 at *19.

b. The Court of Criminal Appeals has repeatedly reiterated the general rule that claims raised and rejected on direct appeal cannot be relitigated in an application for habeas corpus. *See Ex parte Nailor*, 149 S.W.3d 125, 131 (Tex. Crim. App. 2004) (citations omitted). The exceptions to the general rule are (1) when the record on direct appeal cannot be expected to be sufficient to resolve the claim; (2) when the prior judgment has been rendered void; or (3) when the Court of Criminal Appeals has decided to apply relief retroactively after a

subsequent change in the relevant law. *Id.*; *Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994).

c. Because the record on direct appeal was sufficient to resolve Applicant's claims, the prior judgment has not been rendered void and there is no applicable change in law, Applicant's second ground of relief should be denied.

5. In Ground Three, Applicant claims that the Trial Court erred in allowing the highly prejudicial hearsay testimony of Vernette Langon to be admitted. Applicant seems to claim that the victim's statements to Langon were testimonial because Langon is a law enforcement officer and as such, admission of those statements violated Applicant's right to confrontation. Langon was off-duty at the time the victim made her statements. Applicant objected to Langon's testimony and the Trial Court overruled his objection.

a. Not all statements to law enforcement personnel are testimonial under *Crawford*. *See e.g.*, *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006). "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the

primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution". *Id.* Other factors may also be considered, such as the timing, purpose and setting of the statement. the degree of formality of a declarant's interaction with the police, and the likelihood that the declarant expected that the statements could be used in a criminal prosecution. *Martinez v. State*, 236 S.W.3d 361, 372 (Tex. App. – Fort Worth 2007, pet. dism'd).

b. The Second District Court of Appeals determined that the victim's statements to Langon were not testimonial because Langon was not interviewing or interrogating the victim. *Sain*, No. 02-06-00184-CR, 2007 WL 4462599 at *21. Rather, the victim informally approached Langon to request immediate assistance because the victim believed she was in danger. *Id.*

c. Because the victim's statements to Langon were not testimonial, the Supreme Court's holding in *Giles* does not apply and Applicant's right to confrontation was not violated. Therefore, Applicant's third ground of relief should be denied.

Ground Four: Rights of Due Process and a Fair Trial

1. Applicant contends that the Trial Court erred by introducing a newspaper reporter to the jury and failing to adequately instruct the jury not to read

the paper during the trial, leading to one juror reading an article about the trial during the trial. The Trial Court did indentify a newspaper reporter to the jury. *See* Reporter's Record. The Trial Court also submitted to the jury a written jury instruction directing the jury not to "look anything up about the case" or to get information "from some other place." *See* Reporter's Record; Jury Instructions.

2. Applicant presents no evidence to support his claim. In his amended application, Applicant claims that a juror read a newspaper article during the trial but presents no evidence or specific facts indicating such.

   a. In a habeas corpus proceeding, the burden of proof is on the applicant. *Ex parte Rains*, 555 S.W.2d 478 (Tex. Crim. App. 1977). An applicant "must prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Ex parte Williams*, 65 S.W.3d 656, 658 (Tex. Crim. App. 2001). In order to prevail, the applicant must present facts that, if true, would entitle him to the relief requested. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). Relief may be denied if the applicant states only conclusions and not specific facts. *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000). In addition, an applicant's sworn allegations alone are not sufficient to prove his claims. *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988).

b. Although harm to the defendant is presumed when a juror receives information from an unauthorized person about the case, the defendant has the initial burden to show that a juror did in fact receive information about the case. *Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997); *Chambliss v. State*, 647 S.W.2d 257, 265-66 (Tex. Crim. App. 1983).

c. Because Applicant failed to prove that the trial court did not properly instruct the jury or that any juror received information from an unauthorized source, Applicant's fourth ground of relief should be denied.

Recommendation

For all the above reasons, this Court recommends that relief be denied on Applicant's habeas petition. So ordered on this 16 day of March of 2010.

/s/ Sharen Wilson
Hon. Sharen Wilson, Judge
Presiding Criminal District
Court Number One

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-06-184-CR

JOHN RAY SAIN — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT
NO. 1 OF TARRANT COUNTY

MEMORANDUM OPINION[1]

Appellant John Ray Sain appeals his conviction and sentence for murder. In seven points, appellant challenges the legal and factual sufficiency of the evidence to support the jury's rejection of self-defense and defense of property, the legal and factual sufficiency of the evidence to support the jury's failure to find sudden passion, and the admission of the deceased's statements through three witnesses over appellant's Confrontation Clause objections. We affirm.

On November 15, 2003, around ten o'clock in the morning, appellant shot and killed his wife, Elena

---

[1] *See* TEX. R. APP. P. 47.4.

Sain, after she broke into their house through a bedroom window. Elena was leaving appellant because he abused her, and she did not think he was home when she entered the house to retrieve her belongings. Appellant claimed that he shot Elena because he thought that she was a burglar.

Following a five-day trial, a jury convicted appellant of intentional or knowing murder, rejecting his claims of self-defense and defense of property. After hearing evidence and argument on punishment, the jury refused to find that appellant acted as a result of sudden passion and assessed punishment at fifty years' confinement.

In his first and second points, appellant complains that the evidence is legally and factually insufficient to support his conviction for intentional or knowing murder but rather showed that he acted in self-defense or defense of property.

The use of deadly force in self-defense can serve as a defense to otherwise criminal behavior.[2] In that regard, the law in effect at the time of the murder in this case[3] provided,

---

[2] TEX. PENAL CODE ANN. §§ 9.02, 9.31, 9.32 (Vernon 2003).

[3] Although sections 9.31 and 9.32 have since been amended, the offense for which appellant was convicted occurred before the effective date of the amendments (September 1, 2007) and, therefore, is governed by the previous version of these statutes. *See* Act of March 21, 2007, 80th Leg., R.S., S.B. 378, §§ 5, 6

(Continued on following page)

(a) A person is justified in using deadly force against another:

(1) if he would be justified in using force against the other under Section 9.31;[4]

(2) if a reasonable person in the actor's situation would not have retreated; and

(3) when and to the degree he reasonably believes the deadly force is immediately necessary:

(A) to protect himself against the other's use or attempted use of unlawful deadly force; or

(B) to prevent the other's imminent commission of aggravated kidnaping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

(b) The requirement imposed by Subsection (a)(2) does not apply to an actor who uses force against a person who is at the time of

---

(codified as an amendment of TEX. PENAL CODE ANN. §§ 9.01, 9.31, 9.32 and TEX. CIV. PRAC. & REM. CODE ANN § 83.001).

[4] A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. TEX. PENAL CODE ANN. § 9.31(a).

> the use of the force committing an offense of unlawful entry in the habitation of the actor.[5]

In addition, it is a defense to prosecution if the conduct in question is based on the defense of one's property.[6] Texas law provides,

> A person is justified in using deadly force against another to protect land or tangible, movable property:
>
> (1) if he would be justified in using force against the other under section 9.41;[7] and
>
> (2) when and to the degree he reasonably believes the deadly force is immediately necessary:
>
> > (A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or
> >
> > (B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and

---

[5] *Id.* § 9.32.

[6] *Id.* §§ 9.02, 9.41, 9.42 (Vernon 2003).

[7] A person in lawful possession of land or tangible, movable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property. *Id.* § 9.41(a).

(3) he reasonably believes that:

(A) the land or property cannot be protected or recovered by any other means; or

(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to substantial risk of death or serious bodily injury.[8]

After the defendant has introduced some evidence of a defense such as self-defense or defense of property (as opposed to an affirmative defense), the State bears the burden of persuasion to disprove the defense.[9] This burden does not require the State to introduce evidence disproving the defense; rather, the State must prove its case beyond a reasonable doubt.[10] When a jury finds the defendant guilty, there is an implicit finding against the defensive theory.[11]

When reviewing the legal sufficiency of the evidence in the context of the jury's rejection of a defense, we ask whether, after viewing all the evidence in the light most favorable to the prosecution, any

---

[8] *Id.* § 9.42.

[9] *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *Saxton v. State*, 804 S.W.2d 910, 913-14 (Tex. Crim. App. 1991); *Dotson v. State*, 146 S.W.3d 285, 291 (Tex. App.-Fort Worth 2004, pet. ref'd).

[10] *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 913; *Dotson*, 146 S.W.3d at 291.

[11] *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 914.

rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and also could have found against appellant on the defensive issue beyond a reasonable doubt.[12] When a defendant challenges the factual sufficiency of the rejection of a defense, we review all of the evidence in a neutral light and ask whether the State's evidence taken alone is too weak to support the finding and whether the proof of guilt, although adequate if taken alone, is against the great weight and preponderance of the evidence.[13]

The legal and factual sufficiency standards of review are the same for cases based on direct and circumstantial evidence.[14] In a sufficiency review, however, the jury's inference of intent is afforded more deference than the evidence supporting proof of conduct, and circumstantial evidence of a defendant's guilty knowledge is not "required to meet the same rigorous criteria for sufficiency as circumstantial proof of other offensive elements."[15]

The evidence at trial showed as follows:

Appellant had physically abused Elena in the week before her death. Elena told several witnesses that appellant had abused her and she indicated to

---

[12] *Saxton*, 804 S.W.2d at 914; *Dotson*, 146 S.W.3d at 291.

[13] *Zuliani*, 97 S.W.3d at 595.

[14] *King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000).

[15] *Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000).

one that she was afraid appellant would kill her. Four witnesses saw bruises or abrasions on Elena's body in the days before her death, and the medical examiner found bruises on Elena's arm that were several days old. Further, Elena claimed that appellant had abused her two dogs, which were trained and licensed to detect her seizures.

In the days leading up to her death, Elena was in the process of leaving appellant. Officer Mike Lilly responded to a domestic disturbance at the Sains' house on November 12 when appellant locked Elena out of the house. Officer Lilly advised Elena to find another place to stay and to speak to an attorney. On November 14, one day before her murder, Elena left the house with her dogs, and a friend, Karen LaBarre, helped her cash her paycheck and check into a motel. Also on November 14, Valerie Shepard, a manager of an apartment complex, showed Elena an apartment. Elena told Shepard she needed something right away and was most concerned with safety features such as the apartment's alarm system, access gate, and courtesy officer because she was leaving an abusive situation. Elena arranged to pick up the keys to the apartment on November 15. Elena returned to her house on November 15 only to pick up some of her belongings while her husband, she thought, was away. On the morning of the murder, appellant appeared to be away from home. Elena knew that appellant had registered and paid for an all-day gun show that day. She had also searched for, but had not found, appellant's car in the driveway and surrounding

neighborhood.[16] Finally, Elena had circled the house on foot for approximately fifteen to twenty minutes, knocking on windows, looking through the blinds, trying to open the garage door with the electronic keypad, and unsuccessfully trying her key at the front door. Elena told her neighbor, LaBarre, and Officer Lilly that she knew appellant was not home. Further, the jury heard a 911 call that Elena made before entering the house, in which she told the operator that her husband was not home and she was going to break a window to enter the house because her husband had changed the locks and put something on the garage door that prevented it from opening.[17] Elena, therefore, removed a screen from a window, used a metal boot brush and shovel to break the window, pushed aside the curtains, and began to enter the house.

Appellant testified in his own defense. He claimed that on the morning of November 15 the sound of the bedroom window breaking woke him from his sleep, and he saw a figure advancing from behind the blinds and curtains that hung from the window. There was evidence that with the blinds and curtains in place and lights off, the bedroom was dark, even during the day. Appellant testified that he thought the intruder would have a gun, although he did not see one, and

---

[16] There was evidence that the garage was full, and, therefore, the car could not be inside it.

[17] Elena called 911 in order to alert the police that, in case an alarm went off, she was not a burglar.

that he had no way to exit the bedroom. Therefore, he fired two shots at the intruder in self-defense. Neighbors Beth and Jason Glavin, however, both testified that there was an approximately twenty- or thirty-second delay between the time Elena entered the house through the window and the moment that they heard the first shot. Further, the 911 operator called appellant's home phone but received no response, and appellant returned the call on his cell phone at 9:35 a.m., suggesting that he was in fact awake before the break-in.[18]

Appellant also knew that Elena had threatened to break a window to enter their home in the past. During his testimony, appellant acknowledged that he had locked Elena out of the house on November 12 and that she had threatened to break a window or door to reenter. Appellant also admitted that although Elena left unexpectedly with her dogs on November 14, he expected her to come home on the day she was killed.

Appellant claimed that he did not pretend to be away from home. He explained that on the morning of the murder, he dropped his car off at his parents' house and picked up his son's car because he planned to do work on it. Upon returning to his house, he parked his son's car approximately two houses away

---

[18] Elena's 911 call, reporting that she was about to enter the house, ended at 9:51 a.m., and Beth Glavin's 911 call reporting that shots were fired occurred at 9:56 a.m.

from his house – rather than in the driveway, his usual spot, even though he had some trouble walking – because he planned to spray weedkiller and did not want it to get on the car.[19] The car was left within sight of the house, and appellant maintained that Elena was familiar with the vehicle. Further, appellant claimed he last changed the locks to the house after the couple's argument on November 12 but had given Elena a copy of the new keys when they reconciled later that night, and the defense investigator testified that keys found on Elena's body after her death did open some of the doors of the house. Appellant claimed that he did not put anything on the garage door to prevent it from opening.

During his testimony, appellant also denied abusing Elena or the dogs. Appellant claimed that Elena received bruises from breaking up a fight between the dogs. Officer Lilly admitted that, although Elena expressed fear for the dogs' safety with appellant on November 12, she later conceded that appellant had not hurt the dogs in the past. Officer Lilly did not see injuries on Elena or the dogs on November 12.

The ballistics evidence was consistent with both the State's and appellant's theories. Officer Brad Patterson, who processed the crime scene, concluded

---

[19] Appellant also testified, however, that he went to Wal-Mart and Home Depot around 6:00 a.m. on the morning of November 15 in part because he was out of weedkiller, but Wal-Mart did not have the weedkiller, and Home Depot was not open.

that appellant shot from the foot of the bed. The State's ballistics expert, however, indicated on cross-examination that gunshot residue, holes and tears in the bed linens, and a nick on the bedpost were consistent with appellant's claim that he fired the shots from a kneeling position at the head of the bed. The defense investigator, a former police officer, indicated that shooting from such a position could be consistent with either a "defensive posture" or an ambush.

The jury also heard evidence that appellant was not upset by his wife's death. After the shooting, neighbor Jason Glavin ran over to appellant's house, Jason testified that appellant did not have "much reaction," was not emotional, and did not attempt to aid Elena. Jason also saw appellant laughing while seated in the backseat of a police car. Officer Lilly testified that appellant did not appear to be in shock but rather seemed "matter of fact about the circumstance." The officer also stated, however, that appellant was excited, talking very fast, and red in the face. Appellant admitted that he did not try to help Elena, but he did call 911 and thought that he might have been in shock at the time. The State also showed the jury a personal ad that appellant placed on the website "bride.ru" in January 2004, less than two months after Elena's death. Appellant testified that he was sorry that he had killed his wife and that the personal ad was suggested by a counseling group he attended.

While there is some evidence in the record supporting appellant's claims of self-defense and defense

of his property, there is also evidence from which a rational jury could have dismissed appellant's defensive claims. The jury was free to accept or reject all or part of the defensive evidence.[20] After carefully considering the evidence and applying the appropriate standards of review,[21] we conclude that the evidence is legally and factually sufficient to prove the essential elements of murder beyond a reasonable doubt and to support the jury's rejection of appellant's defensive theories. We, therefore, overrule appellant's first and second points.

In his third and fourth points, appellant contends that the evidence is legally and factually insufficient to support the jury's negative finding on sudden passion.

During the punishment phase of a murder trial, a defendant may raise the issue of whether he caused a person's death under the immediate influence of sudden passion arising from an adequate cause.[22] "Sudden passion" means passion directly caused by and arising out of a provocation by the individual killed or another acting with the person killed that arises at the time of the offense and is not solely the

---

[20] *Saxton*, 804 S.W.2d at 914; *Bishop v. State*, No. 02-03-00443-CR, 2005 WL 1189317, at *7 (Tex. App.-Fort Worth May 19, 2005, pet. ref'd) (mem. op., not designated for publication).

[21] *Zuliani*, 97 S.W.3d at 595; *Saxton*, 804 S.W.2d at 914.

[22] TEX. PENAL CODE ANN. § 19.02(d) (Vernon 2003 & Supp. 2006); *Trevino v. State*, 157 S.W.3d 818, 821 (Tex. App.-Fort Worth 2005, no pet.).

result of former provocation.[23] "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.[24] If the defendant proves sudden passion by a preponderance of the evidence, the offense is punished as a second-degree felony.[25] The mere fact that an individual acts in response to provocation, however, is not even sufficient to warrant a sudden passion charge.[26]

In reviewing a legal sufficiency challenge to the jury's failure to find sudden passion, we examine the record for evidence that supports the negative finding while ignoring all evidence to the contrary.[27] Only if no evidence supports the negative finding must we examine the entire record to determine whether it establishes the contrary position as a matter of law.[28]

---

[23] TEX. PENAL CODE ANN. § 19.02(a)(2); *Trevino*, 157 S.W.3d at 821-22.

[24] TEX. PENAL CODE ANN. § 19.02(a)(1); *Trevino*, 157 S.W.3d at 822.

[25] TEX. PENAL CODE ANN. § 19.02(d); *Trevino*, 157 S.W.3d at 822.

[26] *Trevino v. State*, 100 S.W.3d 232, 241 (Tex. Crim. App. 2003).

[27] *Howard v. State*, 145 S.W.3d 327, 334 (Tex. App.-Fort. Worth 2004, no pet.); *Cleveland v. State*, 177 S.W.3d 374, 387 (Tex. App.-Houston [1st Dist.] 2005, pet. ref'd), *cert. denied*, 547 U.S. 1073 (2006); *Cover v. State*, 913 S.W.2d 611, 619 (Tex. App.-Tyler 1995, pet. ref'd).

[28] *Howard*, 145 S.W.3d at 334; *Cleveland*, 177 S.W.3d at 387; *Cover*, 913 S.W.2d at 619.

In reviewing a factual sufficiency challenge to the jury's failure to find sudden passion, we consider all the relevant evidence to determine whether the negative finding is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.[29] Our evaluation should not substantially intrude upon the fact-finder's role as the sole judge of the weight and credibility of witness testimony, and we may not substitute our judgment for that of the fact-finder.[30]

Here, the evidence supporting appellant's claim that the killing was a result of sudden passion arising from an adequate cause showed that he and Elena had a significant argument on November 12; she had unexpectedly left appellant on November 14; and she had just broken a window to enter their house. Other evidence, however, such as the history of physical abuse by appellant, his unusual behavior of parking his son's car away from the house on November 15, and his appearance after the shooting indicated that his actions were not caused by sudden passion. Further, appellant knew Elena had threatened to break a window in order to enter the home only three days before her murder, and evidence showed that appellant had made a phone call shortly before her murder, indicating that he was not asleep as he claimed.

---

[29] *See Trevino*, 157 S.W.3d at 821; *Naasz v. State*, 974 S.W.2d 418, 421 (Tex. App.-Dallas 1998, pet. ref'd).

[30] *Trevino*, 157 S.W.3d at 821.

Moreover, during punishment, Kathleen Sussi, appellant's ex-wife, and Rebecca Lane, an ex-girlfriend, both testified that appellant harassed and threatened them when their relationships with him came to an end.[31] Appellant pleaded guilty in 1988 to reckless conduct for pointing a gun at Sussi. Appellant also pleaded guilty to criminal mischief in 1990 for damaging Lane's car.[32] Appellant presented the testimony of several witnesses that he was a truthful and peaceful person; however, most of these witnesses were not aware of appellant's criminal history.

The jury could have reasonably concluded that, even if Elena's actions of leaving appellant or breaking the window gave rise to some provocation, appellant acted "coolly and deliberately."[33] Viewing the

---

[31] For example, Lane testified that appellant ripped her birth certificate in half, threatened to pour gasoline on her or her property, broke her freezer door and car antenna, attempted to break into the trunk of her car and enter her house, jumped on the hood of her car, piled dirt outside her front door, scratched "gold digger" into the side of her car, punctured thirteen tires, dumped weed killer on her lawn with the words "bitch" and "you die," broke into her mailbox, scratched "you die" on her mailbox, tried to run her off the road, followed her and her children, broke into a law office where she worked and stole some items, turned off her electricity from the outside on more than one occasion, and broke into her house and stole some items.

[32] Appellant also pleaded guilty to an obscenity charge in 1992 and was assessed one year probation.

[33] *Johnson v. State*, 815 S.W.2d 707, 711 (Tex. Crim. App. 1991).

evidence under the appropriate standards,[34] we conclude that some evidence supports the negative finding on sudden passion, and we cannot say that the negative finding is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. We overrule appellant's third and fourth points.

In his fifth, sixth, and seventh points, appellant complains that the trial court improperly allowed witnesses Karen LaBarre, Valerie Shepard, and Vernette Langon to relate hearsay statements in violation of his constitutional rights to confrontation and cross-examination.

The trial court held a hearing outside the presence of the jury on the admissibility of the hearsay statements. The State proffered LaBarre's testimony on statements that Elena made on November 12, 14, and 15. The trial court sustained appellant's objections to the November 12 and 14 statements, and LaBarre did not testify to those statements. The trial court then summarized the November 15 statements as concerning Elena's return to the house to get her things and the reasons why Elena thought appellant was not home. Appellant did not object to that testimony either during the hearing or in front of the

---

[34] *See Trevino*, 157 S.W.3d at 820; *Howard*, 145 S.W.3d at 334.

jury.[35] Appellant, therefore, has forfeited his right to complain of Elena's statements to LaBarre.[36]

The State also proffered Elena's statements to Valerie Shepard. The trial court summarized Shepard's testimony as addressing three issues: security measures in the apartment, abuse of Elena and the dogs, and Elena's fear that appellant would kill her. Appellant did not object to testimony regarding security measures, but he did object to the rest of Shepard's proffered testimony.[37] The trial court overruled appellant's objections, and appellant obtained a running objection.

---

[35] Appellant did object based on hearsay to the first phone call that Elena made to LaBarre around 8:30 a.m. on November 15 and to a question of whether Elena followed through on a promise she made to LaBarre not to enter the house without the police. Both of these objections were sustained, and LaBarre did not answer those two questions.

[36] TEX. R. APP. P. 33.1; *see Mendez v. State*, 138 S.W.3d 334, 341-42 (Tex. Crim. App. 2004).

[37] In the trial court, appellant objected to these three witnesses' testimony based on "hearsay, relevance, doesn't go to state of mind, violation of confrontation cross-examination and a 403 objection." On appeal, however, he contends only that his "constitutional rights to confrontation and cross-examination" were violated by the hearsay statements. Appellant also mentions in passing that "there is not even a recognized exception to the hearsay rules" and that the testimony establishing prior abuse was "extraneous and prejudicial." Because he does not cite relevant case law to support his arguments, if any, based on hearsay and Rule 403, we do not address these grounds. *See* TEX. R. APP. P. 38.1(h).

In *Crawford v. Washington*, the Supreme Court held that the admission of a hearsay statement made by a nontestifying declarant violates the Sixth Amendment if the statement was testimonial and the defendant lacked a prior opportunity for cross-examination, even if the statement falls under a hearsay exception.[38] The Supreme Court declined to spell out a comprehensive definition of testimonial, but it stated that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[39] In *Wall v. State*, the Texas Court of Criminal Appeals concluded that the testimonial character of a statement is determined by a reasonable, similarly situated declarant's ability to appreciate the legal ramifications of his statement.[40] We review the question of whether a statement is testimonial or nontestimonial de novo.[41]

Shepard, an assistant property manager at an apartment complex, met Elena and showed her an apartment on the day before her death. Shepard's testimony indicates that Elena's statements were volunteered. Spontaneous statements to acquaintances are not testimonial.[42] We, therefore, conclude that Elena's

---

[38] 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004).

[39] *Id.* at 68, 124 S. Ct. at 1374.

[40] 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

[41] *Id.*

[42] *Woods v. State*, 152 S.W.3d 105, 114 (Tex. Crim. App. 2004), *cert. denied*, 544 U.S. 1050 (2005); *Freeman v. State*, 230

(Continued on following page)

statements to Shepard were not testimonial and that admission of these hearsay statements did not violate the Confrontation Clause.[43]

In addition, the State proffered the testimony of Vernette Langon, a DPS trooper and neighbor of the Sains. On the morning of her death, Elena approached Langon and asked if Langon would park her patrol vehicle in front of Elena's house so that Elena could get some of her clothes out of the house. Langon, who was off-duty at the time, said that she could not use the patrol car for that purpose but would accompany Elena to her house on foot. After learning that appellant was taking a concealed handgun class, however, Langon decided that it would be best to contact the Fort Worth police department, and she assisted Elena in doing so. Appellant's Confrontation Clause objections were made only to the following: Elena told Langon that she had been abused, was scared, knew her husband was not home, and went to her house to retrieve some of her belongings. The trial court overruled appellant's objection and granted him a running objection to Langon's testimony.

S.W.3d 392, 401 (Tex. App.-Eastland 2007, pet. ref'd) (citing *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1354 (noting that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not")); *see also Wall*, 184 S.W.3d at 735 & n.11.

[43] *See Woods*, 152 S.W.3d at 114.

The statements to Langon differ from the other statements in that they were made to a law enforcement officer. Not all statements to law enforcement personnel, however, are testimonial under *Crawford*.[44] In a later case, *Davis v. Washington*, the Supreme Court articulated the following rule:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[45]

Further, we have held that the timing, purpose, and setting of the statement may be relevant.[46] We may also look to the degree of formality of a declarant's interaction with the police, the purpose and structure of police questioning, and the likelihood that the

---

[44] *See, e.g., Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006),

[45] *Id.*

[46] *Martinez v. State*, 236 S.W.3d 361, 372 (Tex. App.-Fort Worth 2007, pet. dism'd).

declarant expected that the statements could be used in a criminal prosecution.[47]

Here, Langon was not interviewing or interrogating Elena. Rather, Elena informally approached Langon to request immediate assistance because she believed that she was in danger. Langon stated that Elena was desperate to get back into the house while appellant was not home. Generally, statements that are made to police while the declarant believes that she is in personal danger are not made with consideration of their legal ramifications because the declarant speaks out of urgency and a desire to obtain a prompt response.[48]

For these reasons, we conclude that Elena's statements to Langon were not testimonial.[49] Therefore, their admission did not violate appellant's rights under the Confrontation Clause.[50] We overrule appellant's fifth, sixth, and seventh points.

Having overruled all of appellant's points, we affirm the trial court's judgment.

PER CURIAM

---

[47] *See id.*

[48] *Wall*, 184 S.W.3d at 742.

[49] *See id.*

[50] *See Woods*, 152 S.W.3d at 114.

PANEL F: CAYCE, C.J.; HOLMAN and GARDNER, JJ.

DO NOT PUBLISH

TEX. R. APP. P. 47.2(b)

DELIVERED: December 20, 2007

C-1-008852-0985831-A

EX PARTE	§	**IN THE CRIMINAL**
JOHN RAY SAIN	§	**DISTRICT**
	§	
	§	**COURT NUMBER ONE**
	§	
	§	**DALLAS COUNTY,**
	§	**TEXAS**

ORDER DESIGNATING ISSUES

(Filed Oct. 9, 2009)

Having considered the Applicant's Amended Application for Writ of Habeas Corpus and the State's Response, the State's Proposed Memorandum, Findings of Fact, and Conclusions of Law, the Court finds that controverted, previously unresolved facts material to the legality of the Applicant's confinement exist. The Court finds that the following issues are to be resolved:

1) Whether the trial court erred when it allowed certain statements through Karen LaBarre to be admitted;

2) Whether the trial court erred when it allowed certain statements through Valerie Shepard to be admitted;

3) Whether the trial court erred when it allowed certain statements through Vernette Langan to be admitted; and

4) Whether, after introducing the jury to a newspaper reporter who was present in

court, the trial court failed to adequately instruct the jury not to read the newspaper as the trial was ongoing.

IT IS THEREFORE ORDERED that any additional evidence, proposed findings or memoranda be submitted to the Court within thirty days of the date of this order. Thereafter, the Court will consider the record closed and will proceed to a decision in this matter.

Further, the Clerk of the Court is **ORDERED** to send a copy of this order to Applicant, John Ray Sain, Luther Unit. 1800 Luther Drive, Navasota, Texas 77868, Applicant's attorney, Hon. Danny D. Burns, 115 N. Henderson Street, Fort Worth, TX 76102-1940, and to the Appellate Section of the Tarrant County District Attorney's Office.

SIGNED this the 9 day of October, 2009

/s/ Sharen Wilson

JUDGE PRESIDING
CRIMINAL DISTRICT
COURT NUMBER ONE
TARRANT COUNTY, TEXAS

TEXAS
COURT OF CRIMINAL
APPEALS

[SEAL]

Case # PD-0120-08 -> Event: PDR DISP CaseMail

Event Information:

Event Type: PDR DISP
Description: Appellant
Date: 6/11/2008
Disposition: Refused

Opinion Written:

CASE NO. 0985831D

THE STATE OF TEXAS	§	IN THE CRIMINAL
	§	DISTRICT
VS.	§	
	§	COURT NUMBER ONE
JOHN RAY SAIN	§	
	§	TARRANT COUNTY,
	§	TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

Judge Presiding	: HON. SHAREN WILSON	Date of Judgment	: MAY 30, 2006
Attorney for State District Attorney	: TIM CURRY	Assistant District Attorney	: SEAN D. COLSTON JENNIFER TOURJE
Attorney for Defendant	: RICHARD ALLEY	Charging Instrument	: INDICTMENT

Offense Date	*Convicted Offense*	
NOVEMBER 15, 2003	MURDER	
Degree	*Count*	*Plea*
1ST	ONE	NOT GUILTY

Findings on Deadly Weapon	: NONE
Plea to Enhancement Paragraph(s)	: NONE

Plea to Habitual Paragraph(s)	:NONE		
Findings on Enhancement/ Habitual Paragraph(s)	:NONE		
Jury Verdict	:GUILTY		
Punishment Assessed By	:JURY		
Date Sentence Imposed	:MAY 30, 2006	Date to Commence	:MAY 30, 2006
Punishment	:COUNT ONE – FIFTY(50) YEARS		
Place of Confinement	:INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE		
Time Credited	:8 DAYS	Court Costs	:$283.00
Reparation	:NONE	Restitution	:NONE

On this day, set forth above, this cause came for trial, and the State appeared by the above-named attorney, and the Defendant appeared in person in open court, the above-named counsel for Defendant also being present, or, where a Defendant is not represented by counsel, that the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel; and the said Defendant having been duly arraigned and it appearing to the Court that Defendant was mentally competent, and having pleaded as shown above to the indictment herein, both parties announced ready for trial and

thereupon a jury, to-wit, the above named foreman and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read and the Defendant's plea thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider the verdict, and afterward were brought into Court by the proper officer, the Defendant and Defendant's counsel being present, and returned into open court the verdict set forth above, which was received by the Court, and is here now entered upon the minutes of the Court as shown above.

Thereupon, the Defendant elected to have punishment assessed by the above shown assessor of punishment, and when shown above that the indictment contains enhancement paragraph(s), which were not waived, and alleges Defendant to have been convicted previously of any felony or offenses for the purpose of enhancement of punishment, then the Court asked Defendant if such allegations were true or false and Defendant answered as shown above. And when Defendant is shown above to have elected to have the jury assess punishment, such jury was called back into the box and heard evidence relative to the question of punishment and having been duly charged by the Court, they retired to consider such question, and after having deliberated, they returned into Court the verdict shown under punishment above; and when Defendant is shown above to have elected to have punishment fixed by the Court, in due form of law further evidence was heard by the Court

relative to the question of punishment and the Court fixed the punishment of the Defendant as shown above,

IT IS THEREFORE CONSIDERED AND ORDERED by the Court, in the presence of the Defendant, that the said judgment be, and the same is hereby in all things approved and confirmed, and that the Defendant is adjudged guilty of the offense set forth above as found by the verdict of the jury, as set forth above, and said Defendant be punished in accordance with the Jury Verdict or the Court's Finding, as shown above and that the Defendant is sentenced to a term of imprisonment or fine or both, as set forth above, and that said Defendant be delivered by the Sheriff to the Director of the Institutional Division of the Texas Department of Criminal Justice, or other person legally authorized to receive such convicts for the punishment assessed herein, and the said Defendant shall be confined for the above named term in accordance with the provisions of law governing such punishments and execution may issue as necessary.

And, if shown above that the Defendant has been duly and legally convicted of a prior offense by showing the court, cause number, and offense, together with the punishment for such offense and date Defendant was sentenced for such offense in accordance with such conviction, then it is further ORDERED AND ADJUDGED that the punishment herein adjudged against said Defendant shall begin

when the judgment in such prior offense, when shown above shall have ceased to [illegible].

And the said Defendant is remanded to jail until said Sheriff can obey the directions of this judgment.

/s/ Sharen Wilson
PRESIDING JUDGE

Date Signed : MAY 30, 2006

Notice of Appeal : MAY 30, 2006

Mandate Received : _____

NAME JOHN RAY SAIN	OFFENSE MURDER AFTER 9/1/99
ADDRESS [OMITTED] FORT WORTH TX 76131	DATE 11/15/2003
RACE W SEX M	I.P. ELENA SAIN
AGE 49 DOB [OMITTED]	AGENCY **DIRECT** District Attorney
CASE NO 0985831	OFFENSE NO. 03131879
DATE FILED 7/15/2005	COURT Criminal District Court No. 1
CID NO. 0113964	

INDICTMENT NO. 0985831D

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS OF TARRANT COUNTY, TEXAS,

duly elected, tried, empaneled, sworn, and charged to inquire of offenses committed in Tarrant County, in the State of Texas, upon their oaths do present in and to the 213th DISTRICT COURT

of said County that JOHN RAY SAIN, hereinafter called Defendant, in the County of Tarrant and State aforesaid, on or about the 15th day of November 2003, did

THEN AND THERE INTENTIONALLY OR KNOWINGLY CAUSE THE DEATH OF AN INDIVIDUAL, ELENA SAIN BY SHOOTING ELENA SAIN WITH A FIREARM,

PARAGRAPH TWO: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE SAID DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID, ON OR ABOUT THE 15TH DAY OF NOVEMBER, 2003, DID THEN AND THERE INTENTIONALLY, WITH THE INTENT TO CAUSE SERIOUS BODILY INJURY TO ELENA SAIN, COMMIT AN ACT CLEARLY DANGEROUS TO HUMAN LIFE, NAMELY, SHOOT ELENA SAIN WITH A FIREARM, WHICH CAUSED THE DEATH OF ELENA SAIN,

Filed (Clerk's use only)
11:15 am ACM

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Tim Curry
Criminal District Attorney
Tarrant County, Texas
INDICTMENT – ORIGINAL

/s/ Ted Hughes
Foreman of the Grand Jury